SUPREME COURT, U. S.

MAY 27 1968

JOHN F. DAVIS, CLERK

NO. 1090

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

AARON HENRY ..... Petitioner

vs.

STATE OF MISSISSIPPI ..... Respondent

RESPONSE TO PETITION FOR CERTIORARI

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Comes the State of Mississippi and for response to the Petition for Certiorari filed herein says:

In *Henry v. Mississippi*, 379 U.S. 443, 446, 85 S. Ct. 564, 566, 13 L. Ed. 2d 408 (1965), this Court said:

> "We vacate the judgment of conviction and remand for a hearing on the question whether the petitioner is to be deemed to have knowingly waived decisions of his Federal claim when timely objection was not made to the admission of the illegally seized evidence."

At 379 U.S. 451, 452, 85 S. Ct. 569, 13 L. Ed. 2d 414, 415, this Court suggested that the actions of defendant's counsel in not objecting to the admissibility of the evidence obtained as a result of the search of petitioner's car was a strategic move and stated that if that were true, it would be binding on defendant. The Court said:

> "The evidence suggests reasons for a strategic move. Both the complaining witness and the police officer testified that the cigarette lighter in the car did not

work. After denial of its motion for a directed verdict the defense called a mechanic who had repaired the cigarette lighter. The defense might have planned to allow the complaining witness and the officer to testify that the cigarette lighter did not work, and then, if the motion for directed verdict were not granted, to discredit both witnesses by showing that it did work, thereby persuading the jury to acquit. Or, by delaying objection to the evidence, the defense might have hoped to invite error and lay the foundation for a subsequent reversal. If either reason motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, see Whittus v. Balkcom, 333 F. 2d 496 (C.A. 5th Cir. 1964), we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case." 379 U.S. 451, 452, 85 S. Ct. 569, 13 L. Ed. 2d 414, 415 (1965).

Upon remand to the trial court an evidentiary hearing was had and the trial court sustained petitioner's objection to his testifying and to his attorney testifying. While the objections did not so specify, it is obvious that the former was on the ground of self-incrimination and the latter on the ground of privileged communication between attorney and client. The trial court, erroneously we say, sustained the objections and only allowed testimony by appellant's attorney, Brown, to the effect that

he and the other attorneys who represented appellant at his trial were all present in Justice of the Peace Court where appellant was originally tried and that the evidence obtained as a result of the search of petitioner's car was presented at that original trial, thus charging petitioner and his counsel with knowledge of the existence of the evidence and its probable use on trial de novo in the County Court of Bolivar County, Mississippi. The trial court then found that the State had failed to prove that either petitioner or his counsel had deliberately bypassed the contemporaneous objection rule in Mississippi.

Upon review of that finding by the Supreme Court of Mississippi, that Court found as a fact that the State met the burden of proving that defendant's counsel deliberately waived objection to the evidence as a strategic move and that in the absence of any attempt whatever to rebut the compelling inference that the failure to object was deliberate, there was a waiver. The State produced all the evidence it had, and that evidence pointed clearly to a waiver. As commented on by the Mississippi Supreme Court;

> "All evidence to the contrary is within the sole possession of defendant and his counsel. They have not been willing to reveal what really took place at defendant's end of the counsel table. They should not now be heard to say that there was no waiver." Henry v. State, 198 So. 2d 213, 218, (Miss. 1967).

This Court will recall that at all stages throughout the several years that this case has been in litigation the State of Mississippi has challenged appellant and his several counsel to come forward by affidavit to the effect that either one of them did not know of the necessity

of objecting to this evidence and this Court commented on that fact. "What really took place at defendant's end of the counsel table" is locked within the collective minds of petitioner and his three counsel and they do not appear to be willing for the truth to prevail.

Therefore, as reasoned by the Mississippi Supreme Court, the only possible inference that can be drawn from petitioner and his counsel not being willing to testify is that their testimony would be against petitioner's interest.

While the Mississippi Supreme Court rightly makes a distinction between the privilege that exists between communications between attorney and client, doctor and patient, and husband and wife, the law in Mississippi is that if, as between doctor and patient, a patient-litigant claims the privilege and refuses his adversary the right to examine his physician, the jury can be instructed that they would be justified in inferring that the physician's testimony would have been unfavorable to him. *Killings v. Metropolitan Life Ins. Co.*, 187 Miss. 265, 192 So. 577, 131 ALR 684; *Gulf Refining Company v. Myrick*, 220 Miss. 429, 71 So. 2d 217 (1954). The same rule of inference should apply to the case at bar in support of the decision of the Mississippi Supreme Court in its finding of a deliberate waiver.

CONCLUSION

Wherefore, it is respectfully submitted that the petition herein should be dismissed and a judgment entered affirming the judgment of the Mississippi Supreme Court.

Respectfully submitted,

JOE T. PATTERSON, *Attorney General*

BY G. GARLAND LYELL, JR.
Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Response to Petition for Certiorari to Hon. Barbara A. Morris, Attorney at Law, 1790 Broadway, New York, New York 10019 and Honorable Jack Young, Attorney at Law, 115½ N. Farish Street, Jackson, Mississippi.

This the 23rd day of May, A. D., 1968.

Assistant Attorney General